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In the Supreme Court

of the United States

OCTOBER TERM, 1962

No. 579

FLORENE I. MILLER and CATHERINE M. SMITH, Executrices of the Estate of Mark Peter Miller, Deceased.

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

TERMINAL FLOUR MILLS COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Florence I. Miller and Catherine M. Smith, Executrices of the estate of Mark Peter Miller, deceased, and Petitioner Terminal Flour Mills Company pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the

Ninth Circuit, entered May 14, 1962, rehearing denied June 15, 1962, which reversed the judgment of the United States District Court for the District of Oregon.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 303 F.2d 703 (1962). The opinion of the United States District Court for the District of Oregon has not been reported in the Federal Supplement. This opinion appears in the printed record (R. 690-695)[1] filed with this Petition. Both opinions appear in the Appendix.

The order denying the petition for rehearing was entered without an opinion.

JURISDICTION OF THIS COURT

The original judgment of the District Court was entered on February 29, 1960. A timely notice of appeal was given and the judgment of the trial court was reversed as above described, the order denying rehearing being entered on June 15, 1962. An order by the Honorable Earl Warren, Chief Justice, entered on September 10, 1962, extended the time for filing this petition to and including November 12, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

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[1] The references are to the record in *United States* v. *Terminal Flour Mills Company*, No. 17009, which was used in the court below on the combined appeal. The two cases were consolidated for trial.

QUESTIONS PRESENTED

The judgment of the Court of Appeals reversed a judgment of the District Court awarding damages under the Federal Tort Claims Act, 28 U.S.C. 1346 (b), 2671, et seq., for the wrongful death of Mark Peter Miller and for the destruction of the aircraft he was piloting arising out of a mid-air collision over Boeing Field, Seattle, a federally controlled field. The questions presented are:

1. Is the Court of Appeals permitted under F.R.C.P. 52 (a) to overturn a finding of fact[2] on grounds other than "clearly erroneous" by simply characterizing the finding as a conclusion of law?

2. When do the Federal Regulations governing right-of-way apply and, if applicable, do these Regulations impose an absolute duty upon the pilot of the disfavored aircraft to determine the presence of other aircraft having the right-of-way as was held by the Court of Appeals or do these Regulations merely require reasonable care similar to the "rules of the road" governing land vehicles?

3. Can the duty of a pilot under the direction of a federal control tower be considered separately from the duty of the tower to warn of other known aircraft or must the respective duties of the tower and the pilot be considered together?

The first question listed above is novel because of

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[2] The finding in question concerns the ability of a pilot to see another aircraft where a camouflage effect exists.

the unusual reasoning employed by the Ninth Circuit in reversing the trial court. The uniqueness and importance of the remaining questions arise out of the relative scarcity of decisions involving collisions between aircraft in the control zone of a federal airport tower. Federal responsibility under the Tort Claims Act for operation of control towers, once defined in *Eastern Airlines* v. *Union Trust Co.*, 221 F.2d 62 (C.A. Dist. Col. (1955), affirmed sub nom, *United States* v. *Union Trust Co.*, 350 U.S. 907, is now the subject of substantial doubt due to the opinion below. These questions, Petitioners submit, justify review by this Court.

STATUTES AND RULES INVOLVED

(1) Federal Tort Claims Act. 28 U.S.C. 2674, providing in pertinent part:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> "If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

(2) Air Traffic Rules, 14 C.F.R. 617.4 *Air Traffic Control Service*. The primary objective of the Air Traf-

fic Control Service shall be to promote the safe, orderly, and expeditious movement of air traffic. This shall include:

"(c) assisting the person in command of an aircraft by providing such advice and information as may be useful for the safe and efficient conduct of a flight."

(3) Air Traffic Rules. 14 C.F.R. 617.21 *General Responsibility*.

"(a) *Responsibility of airport traffic control towers.*

"(1) An air port traffic control tower is responsible for the issuance of clearances and information to pilots of aircraft for the purpose of preventing collisions between:

"(iii) Aircraft in the traffic pattern and landing and taking off at the landing area.

"(b) *Responsibility of pilots.*

"(1) When flying in visual flight rule weather conditions it is considered the direct responsibility of the pilot to avoid collision with other aircraft. Under such conditions, the information and clearances issued by the control tower are intended to aid pilots to the fullest extent in avoiding collisions."

(4) Air Traffic Rules. 14 C.F.R. 617.22 *Control of traffic on and in vicinity of landing area.*

"(a) *General.* Airport traffic controller shall maintain a continuous watch on all visible flight operations in the control zone, including aircraft, vehicles, and personnel on the landing area, and shall control such traffic in accordance with the procedure set forth in this section and all applicable air traffic rules. If there are other landing areas within the zone, traffic at all landing areas within

the zone shall be coordinated so as to eliminate any hazardous conflictions of traffic patterns."

(5) Air Traffic Rules, 14 C.F.R. 617.26 *Local Traffic Information*.

"(a) *Essential local traffic.*

"(1) When operating under visual flight rules it is the responsibility of the pilot to avoid collision with other aircraft. However, due to the restricted space on and around landing areas, it is often essential that traffic information be issued to aid the pilots to avoid collision between aircraft. Essential local traffic shall be considered to consist of the following:

"(i) Traffic within the Control Zone.

"(ii) Ground traffic.

"(2) Essential traffic within the Zone shall include all known traffic in the Control Zone which might constitute a hazard to the operation of the aircraft concerned.

"(3) Essential ground traffic . . .

"(b) *Issuance.*

"(1) Detailed essential local traffic information shall be issued when, in the judgment of the controller, such information is necessary in the interests of safety, or when requested by a pilot."

(6) Air Traffic Rules, 14 C.F.R., part 60, Sections 60.14 (b) and (d) providing in pertinent part:

"*Right-of-way*. An aircraft which is obliged by the following rules to keep out of the way of another shall avoid passing over or under the other, or crossing ahead of it, unless passing well clear:

Note: Right-of-way rules do not apply when, for reasons beyond the pilot's control, aircraft can-

not be seen due to restrictions of visibility. The aircraft which has the right-of-way will normally maintain its course and speed, but nothing in this part relieves the pilot from the responsibility of taking such action as will best aid to avert collision.

* * * * *

"(b) *Converging.* Aircraft converging shall give way to other aircraft of a different category in the following order: airplanes, and rotocraft shall give way to airships, gliders, and baloons; airships shall give way to gliders and balloons; gliders shall give way to balloon. When two or more aircraft of the same category are converging at approximately the same altitude, each aircraft shall give way to the other which is on its right. In any event, mechanically driven aircraft shall give way to aircraft which are seen to be towing other aircraft;

* * * * *

"(d) *Overtaking.* An aircraft that is being overtaken has the right-of-way, and the overtaking aircraft, whether climbing, descending, or in horizontal flight, shall keep out of the way of the other aircraft by altering its course to the right, and no subsequent change in the relative positions of the two aircraft shall absolve the overtaking aircraft from this obligation until it is entirely past and clear;

Note: Passing an overtaken aircraft on the right is required because the pilot in side-by-side, dual-control aircraft is seated on the left and has a better view on that side. Further, in narrow traffic lanes, passing on the left of an overtaken aircraft would place the overtaking aircraft in the path of the oncoming traffic."

STATEMENT OF THE CASE

Petitioners, Florene I. Miller and Catherine M. Smith, as Executrices under the Will of Mark Peter Miller, deceased, filed an action in the United States District Court for the District of Oregon against the United States under the Tort Claims Act, 28 U.S.C. 1346 (b), for the wrongful death of Mark Peter Miller who died in a mid-air collision between two privately owned aircraft. The collision occurred under Visual Flight Rules (VFR) conditions in the vicinity of Boeing Field near Seattle, Washington, on the morning of June 21, 1956. Petitioner, Terminal Flour Mills Company, an Oregon corporation, the owner of the aircraft piloted by the decedent, also filed an action in the same court for damages arising out of the destruction of the aircraft. The cases were consolidated for trial on the segregated issue of liability and were tried before the Honorable District Judge sitting without a jury.

The trial court found that the United States, through its employees, was negligent in several respects, including the failure to warn the decedent of the presence of and possibility of collision with other aircraft, particularly the aircraft involved in the collision, a single engine Cessna; and its failure to control the aircraft in the traffic pattern, particularly the aircraft operated by the decedent and the Cessna, so as to avoid collision (R. 35, 36).

The United States contended Miller was contributorily negligent in several respects, including failure

to keep a proper lookout and failure to yield the right of way. The trial court found that he was not negligent in any of the particulars charged (R. 36). It further found, specifically, that the United States had a duty to provide, and the decedent properly relied upon it to so provide (R. 35), information of essential local traffic, including information of the presence of the Cessna; that the information was not provided; and that the decedent could have maintained a reasonable lookout for the Cessna without having seen it (R. 35).

The Court of Appeals did not find that any of the findings of fact made by the trial court were unsupported by the evidence.

The Court of Appeals, without reference to the tower's failure to warn, found Miller contributorily negligent in failing to see the Cessna and, as a result, failing to yield the right of way thereby causing the collision.

REASONS FOR GRANTING THE WRIT

I. A basic precept of federal judicial procedure has been jeopardized by the decision of the Court of Appeals which has overturned a finding of fact by characterizing that finding as a conclusion of law and thereby evading the "clearly erroneous" limitation imposed upon Courts of Appeal by F.R.C.P. 52 (a) when passing upon findings of fact entered by the trial judge.

A trial court's findings of fact cannot be set aside unless they are clearly erroneous. This limitation imposed upon courts of appeal by F.R.C.P. 52 (a) has been observed with dedication by all circuits, including the

Ninth. *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 96 L. Ed. 978, 984 (1951); *Hycon Manufacturing Company* v. *H. Koch and Sons*, 219 F.2d 353, 355 (C.A. 9, 1955); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 396, 92 L. Ed. 746, 766 (1948); *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342, 94 L. Ed. 150 (1949). Corollaries to this rule hold that a court of appeals is not bound by an erroneous conclusion of law or a finding of fact induced by an erroneous view of the law. *Smallfield* v. *Home Ins. Co. of N.Y.*, 244 F.2d 337 (C.A. 9, 1957). Aside from these exceptions, neither of which are applicable to this case, a finding of fact must stand unless clearly erroneous.

The opinion below considered the trial court's finding upon a traditional fact question (ability to see), declared the finding to be a conclusion of law, then, reversed the finding because the Court was unwilling to believe its accuracy. The Appellate Court in using this procedure has unwittingly sidestepped the limitations of Rule 52 (a) by a device as simple as the rule itself. The opinion, if allowed to stand, will represent an encroachment upon the binding effect conferred upon fact findings supported by creditable evidence. Petitioners submit that this Court should examine the novel approach employed by the Ninth Circuit since it jeopardizes one of the fundamental precepts of appellate practice.

A brief examination of the opinion will demonstrate Petitioners' position. The Ninth Circuit refers[3] first to

[3] Appendix A, page 35.

the finding in question" " the trial court found as a fact that '* * * Miller could have maintained a reasonable lookout while approaching the point of traffic and not have seen the Cessna because of his limited visibility and the camouflage effect of the background.' " Then the opinion[4] states:

> "The trial court did not find that, by reason of the camouflage effect, the Cessna was physically invisible[5]. It found only that a reasonable lookout might not have revealed the Cessna. *This was actually more of a conclusion of law than a finding of fact.*" (Emphasis supplied)

The opinion, in a footnote,[6] indicates initially that the finding is to be left undisturbed. However, the Court proceeds to overturn the finding (which has now been characterized as a conclusion of law) with the following statement:

> "The motion of the white winged Cessna across the stationary background composed of multi-colored objects would have made it visible."[7]

It is important to distinguish between the issue of *duty to see* and the question of *ability to see*. The

[4] Appendix A, page 37.

[5] This statement ignores a separate finding entered by the trial court (R. 33) which says: "2. The background of the line of sight between the Beechcraft and the Cessna was composed of a multi-patterned and a multi-colored heterogeneous grouping of buildings, streets, trees, ground and other objects, forming a camouflage against which it was extremely difficult, if not impossible at times, for the Cessna to be seen."

[6] Appendix A, page 35.

[7] Appendix A, page 37.

[8] Petitioners are unable to find any evidence to support this position taken by the Court of Appeals and the decision itself makes no reference to the record. Apparently, this is a factual determination based upon the Court's application of commonly accepted physical principles.

former can present a mixed question of law and fact well within the scope of review granted to appellate courts. However, the *ability to see* has no legal connotation whatsoever and can only be a question for the trier of fact, in this case the district court sitting without a jury. This was the approach taken by the court in *Khourey* v. *American Airlines, Inc.*, 170 Ohio St. 310, 164 N.E.2d 402 (1960). An airliner at pattern altitude was struck by a Navy Beechcraft causing damage to the nose wheel which collapsed upon landing. Both planes were being controlled by a CAA tower at the time. A passenger brought suit against the airlines to recover for personal injuries received while sliding down a cotton rope used for emergency exits. The issue was whether the airlines pilot and co-pilot had exercised reasonable care with respect to lookout in order to determine the presence of the navy aircraft. The Supreme Court of Ohio held that the question of lookout was purely one of fact properly submitted to the jury.

The Ninth Circuit itself has, in other cases, considered trial court holdings on contributory negligence to be in the nature of findings of fact. The court in an opinion filed one day subsequent to the decision herein, refused to disturb a finding of the district court that the plaintiff was not contributorily negligent in failing to keep an adequate lookout. The court stated in *United States* v. *Grissler*, 303 F.2d 175 (C.A. 9, 1962), another Tort Claims Act case, that:

> "Appellant, while admitting that there was substantial evidence of its own negligence, argues that appellee Charles Grissler was contributorily negligent because he failed to see Appellant's automobile in

> time to prevent the collision. The question of whether appellee Charles Grissler was contributorily negligent is a pure question of fact. The court found that appellee Charles Grissler was operating his automobile in a reasonably prudent manner in all respects and in accordance with all applicable traffic laws. The court's finding is amply supported by the evidence. We cannot set aside a finding of the district court unless it is clearly erroneous. Rule 52 (a) Federal Rules of Civil Procedure, 28 USCA. The findings are not clearly erroneous."

The different approaches taken by members of the same circuit toward an identical question is, to say the least, striking.

The purpose of Rule 52 (a) was aptly stated in *Lundgren* v. *Freeman*, 307 F.2d 104 (C.A. 9, 1962), decided six weeks after the case at bar. The court said:

> "Rule 52 (a) should be construed to encourage appeals that are based on a conviction that the trial court's decision has been unjust; it should not be construed to encourage appeals that are based on the hope that the appellate court will second-guess the trial court."

Petitioners respectfully submit that the opinion in the court below authorizes a court of appeals to substitute its judgment upon fact questions for that of the trial court through the simple technique of characterizing a finding of fact as a conclusion of law. A clear need arises, therefore, for this Court to pass upon the propriety of the technique employed by the Ninth Circuit which will encourage groundless appeals based upon the hope that a trial *de novo* can be had at the appellate level.

II. Review of the decision below will provide this Court with an opportunity to pass upon the unique and important question of the duty imposed upon pilots in airport traffic patterns to determine the presence of other aircraft having the right of way under federally promulgated regulations and when the regulations apply.

The court was in error, Petitioners submit, when it applied the right-of-way rules governing "converging" and "overtaking" aircraft.

The uncontradicted testimony had the Cessna climbing toward the Beechcraft and then turning suddenly into its path (R. 500, 539). The very language of the right-of-way rules themselves precludes their application in this situation. The trial court, under this view of the evidence, was entitled to find Miller free of any contributory negligence based upon failure to yield the right-of-way. However, this is not the error upon which Petitioners rely for certiorari. Review by this Court is requested for the purpose of considering the lower court's construction of the right-of-way rules. A discussion of the right-of-way rules necessitates an examination of the duty of lookout to determine the presence of an aircraft alleged to have the right-of-way.

Right-of-way and lookout are the most basic and frequently invoked of all the "rules of the road" governing land traffic. The rules will be invoked with increasing frequency to determine the duties and rights of pilots.

Petitioners believe that this is the first time any court has construed the right-of-way regulations promulgated

by the CAA (now FAA) and the duty of lookout inherent in these regulations. The construction of the court below would impose an absolute duty on the disfavored pilot to determine the presence of aircraft having the right-of-way. This duty is far in excess of that of reasonable care traditionally imposed upon the disfavored driver of a land vehicle to determine the presence of other vehicles having the right-of-way.

The decision below will certainly be invoked in future mid-air collision cases. This Court should have the opportunity of at least examining a holding which imposes an absolute duty rather than the duty of due care. This Court may feel that the analogy between the aircraft and vehicle right-of-way cases is not strong enough to carry the reasonable man test into the field of air traffic control. However, the issue was never briefed before the court below since both parties, along with the trial court, considered right-of-way regulations to impose merely the duty of reasonable care to determine the presence of other aircraft having the right-of-way.

Part I of this petition dealt with the issue of *ability to see* as a question of fact reserved to the judgment of the trial court. This portion of the petition deals with the duty or degree of care with reference to lookout and the concommitant duty to yield the right-of-way to another aircraft which has been observed. It is important to distinguish between the duty to yield the right-of-way and the duty to keep a lookout for planes having the right-of-way. Petitioners admit that the right-of-way regulations absolutely require the disfavored

aircraft to yield to a plane whose presence is known. The issue is the degree of care the disfavored pilot must exercise to determine the presence of such aircraft. This is where the trial court and the Court of Appeals took divergent views. The District Court's finding[9] employed the reasonable man test when it concluded:

> "Mark Peter Miller could have maintained a reasonable lookout while approaching the point of impact and not have seen the Cessna because of his limited visibility and the camouflage effect of the background."

The Ninth Circuit held a reasonable lookout to be inadequate, but the standard of care espoused in the opinion is indefinite and difficult to apply. The court below said:

> "It may be that in order to have seen the Cessna against this background Miller would have had to look thoroughly and diligently in the area in which the Cessna was flying. But if this is the degree of care required of the ordinary prudent pilot, then such is the standard to which Miller must be held. We believe that this is the standard imposed by the rules and it is not for the courts to say that the standard is too exacting."

The above standard as imposed by the Ninth Circuit placed an absolute duty upon Miller to see the Cessna in view of the trial court's finding (R. 33) that at times, due to the camouflage effect alone, it was impossible for Miller to see the Cessna. A duty to see and avoid that which cannot be seen must be considered absolute rather than merely a duty "to look thoroughly and diligently." This concept of the duty of lookout is contrary to the

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[9] Appendix C, page 60.

standard applied by other courts, both in aircraft and automobile cases.

The Florida Supreme Court in *Peavey* v. *City of Miami*, 146 Fla. 629, 1 So. 2d 614 (1941), discussing the duty of lookout to be imposed held:

> "An aviator is under no duty to use the highest degree of care that men of reasonable diligence or foresight ordinarily exercise in the operation of airplanes, but is bound only to use ordinary care, although here, as in any other case, ordinary care differs with the circumstances."

In *State, to the use of Birckhead*, v. *Sammon*, 171 Md. 178, 189 Atl. 265 (1936), the pilot's view of the landing strip was blocked by the fuselage and lower wing and could have been cleared only by dipping the wing. The plane struck a boy on a bicycle as it was landing. It was held that the rules of negligence applying to land vehicles were likewise applicable to aircraft cases in the absence of a statute and the duty of lookout was merely ordinary care under the circumstances. Likewise, a pilot need only use ordinary care to determine the presence of telephone wires in the glide path. *Fuelberth* v. *Splittgerber*, 150 Neb. 309, 34 N.W.2d 380 (1948).

The *Khourey* v. *American Airlines* case, ob. cit., page 12, held that airlines as common carriers will be required to exercise the highest degree of care with respect to lookout. The Miller court has imposed an even higher duty upon petitioners decedent than that of the common carrier, i.e., an absolute duty.

The law of the situs requires drivers of automobiles

at railroad crossings to use only reasonable care to determine the presence of approaching trains. *Stewart* v. *Northern Pacific Railroad Co.*, 96 Wash. 486, 165 P. 377 (1917). The same duty is imposed upon drivers of automobiles at intersections where a car is approaching from the right. *Roberts* v. *Leahy*, 35 Wash.2d 648, 214 P.2d 673 (1950). The Ninth Circuit should be prohibited from reversing a finding supported by the evidence and based upon the normal standards of due care. However, this conclusion is only valid if it is admitted that the normal standards of due care are applicable rather than the absolute duty imposed by the opinion of the Ninth Circuit. It is this choice between the standards of care which is the issue worthy of review by this Court.

Petitioners respectfully suggest that the problems that exist in the opinion before this Court arise out of an erroneous concept of the duty of reasonable care. Due care or reasonable care has traditionally been defined as that care which a reasonable man would exercise *under all the circumstances*. Reasonable care under the circumstances of this collision could very well mean looking "thoroughly and diligently" as the Ninth Circuit has held. However, the trial court, in finding that Miller acted with reasonable care, of necessity found that he did so *under all the circumstances*, including looking "thoroughly and diligently" if the circumstances required. In other words, reasonable care admits of degrees depending upon the circumstances and, as pointed out in Part I hereof, the question of whether a plaintiff exercised an adequate degree of

care is one of fact to be decided by the district court judge in Tort Claims Act cases. However, if the Ninth Circuit actually intended to impose an absolute duty to see and avoid planes having the right of way under the Air Traffic Rules,[10] then the decision represents a return to the days when flying was considered an ultra-hazardous activity.

The United States, by an act of congress and through the CAA, has promulgated right-of-way regulations governing aircraft. The opinion below represents the first attempt by a court to construe the duties imposed by these regulations. The Ninth Circuit, in this case of first impression, has imposed an absolute duty, which duty is of a wholly different nature than the one traditionally imposed in right-of-way cases.[11]

It is inevitable, and unfortunately so, that the increasing density of air traffic will result in future mid-air collisions at federally controlled fields. The opinion below will certainly be a landmark case in establish-

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[10] The trial court's finding (R. 33) that the camouflage effect made the Cessna "extremely difficult, if not impossible at times" to be seen was left undisturbed. Therefore, the duty prescribed by the Ninth Circuit must be considered as absolute when it holds a pilot responsible for failing to give right of way to another plane whose presence was incapable of detection.

[11] Petitioners appreciate that this Court does not sit to reverse error. However, the court below misconceived the manner in which the CAA intended the right of way rules to be applied. The Air Traffic Rules, CFR, part 60, section 60.14, has a proviso that "Right-of-way rules do not apply when, for reasons beyond the pilot's control, aircraft cannot be seen due to restrictions of visibility . . ." The Ninth Circuit held (Appendix A, page 36) that the proviso contemplated only "physical impossibility" Petitioners submit that the words "cannot be seen," would apply to an aircraft which could not be seen against a camouflage background (R. 33).

ing the duty imposed upon pilots. Petitioners respectfully submit that the issues here presented are so basic to air traffic control that a consideration of the law is both warranted and necessary with respect to existing regulations and regulations which may be promulgated in the future.

III. Increasing air traffic and the Government's entry into the field of air traffic control has created a clear need for a pronouncement from this Court upon the interlocking duties to be imposed upon the control tower operator and the pilot: This issue has been badly clouded by the opinion below which considered solely the duties of the pilot without reference to the related duties of the control tower.

The opinion below holds that, as a matter of law, Miller breached his duty to see and avoid the Cessna, the very airplane of which the tower negligently failed to warn him. The duty of the pilot to observe other aircraft and the duty the tower operator to warn of such aircraft, must, as a practical matter, be related and highly interdependent if effective air traffic control is to be maintained at airports. Presumably, the holding below would have been the same even if there had been no tower. This approach taken by the court below is inimical to the philosophy of all Federal Air Regulations which are based upon cooperation between the pilot and the tower. The Civil Air Regulations define the mutually reciprocal duties of the pilot and the tower operator. The Code of Federal Regulations, Title 14, Civil Aviation, provides in pertinent part:

> "617.4 *Air Traffic Control Service.* The primary objective of the Air Traffic Control Service shall

be to promote the safe, orderly, and expeditious movement of air traffic. This shall include:

"(c) assisting the person in command of an aircraft by providing such advice and information as may be useful for the safe and efficient conduct of a flight"

"617.21 *General Responsibility.*

"(a) *Responsibility of airport traffic control towers.*

"(1) An airport traffic control tower is responsible for the issuance of clearances and information to pilots of aircraft for the purpose of preventing collisions between:

"(iii) Aircraft in the traffic pattern and landing and taking off at the landing area.

"(b) *Responsibility of pilots.*

"(1) When flying in visual flight rule weather conditions it is considered the direct responsibility of the plot to avoid collision with other aircraft. Under these conditions, the information and clearances issued by the control tower are intended to aid pilots to the fullest extent in avoiding collisions."

"617.22. Control of traffic on and in the vicinity of landing area.

"(a) General. Airport traffic controller shall maintain a continuous watch on all visible flight operations in the control zone, including aircraft, vehicles, and personnel on the landing area, and shall control such traffic in accordance with the procedure set forth in this section and all applicable air traffic rules. If there are other landing areas within the zone, traffic at all landing areas within the zone shall be co-ordinated so as to eliminate any hazardous and conflictions of traffic patterns."

"617.26 *Local Traffic Information.*

"(a) *Essential local traffic.*

"(1) When operating under visual flight rules

it is the responsibility of the pilot to avoid collision with other aircraft. However, due to the restricted space on and around landing areas, it is often essential that traffic information be issued to aid the pilots to avoid collision between aircraft. Essential local traffic shall be considered to consist of the following:

"(i) Traffic within the Control Zone.

"(ii) Ground Traffic.

"(2) Essential traffic within the Zone shall include all known traffic in the Control Zone which might constitute a hazard to the operation of the aircraft concerned.

"(3) Essential ground traffic . . .

"(b) Issuance

"(1) Detailed essential local traffic information shall be issued when, in the judgment of the controller, such information is necessary in the interests of safety, or when requested by a pilot."

The nature of the duties upon both pilot and the tower must, of course, be examined in the light of the fact situation as it existed at the time of the collision. The relevant facts bearing on the duty of the tower have been established at trial and were left unchallenged by the Ninth Circuit. These facts[12] can be briefly summarized as follows:

1. The collision occurred on June 21, 1956, at approximately 9:35 a.m. under Visual Flight Rules (VFR) at a point approximately 1000 feet above sea level, which point was within the air traffic pattern then in use and was visible from the tower.

[12] The findings of fact and conclusions of law entered by the trial court are set forth in toto in Appendix C. Petitioners here refer only to those facts which emphasize the necessity of considering together the duties of the pilot and the tower.

2. The tower, operated by CAA personnel, cleared the Beech (Miller) to enter the right traffic pattern *with knowledge* that the following circumstances existed:

(a) Three Cessnas[13] with student pilots at the controls were making touch and go landings in the right traffic pattern controlled by the tower with lightgun signals; one of which continued in the pattern pursuant to a green light given by the tower. The Beech had been cleared to enter the same pattern and eventually collided with the Cessna which had been cleared to continue by light signal from the tower;

(b) None of the three student Cessnas could be effectively controlled by the tower because their radio was not functioning whereas the tower did have voice radio contact with the Beech;

(c) The Cessna, due to the camouflage effect caused by the background, the positions of the two planes, and the circumstance that the Beech was a low-wing plane, either could not have been seen by Miller or could have been seen only with great difficulty.

3. The Cessna was essential local traffic with respect to the Beech, the presence of which the tower had a duty to warn and Miller along with the pilot of the Cessna relied upon the tower to supply them with this "essential local traffic information."

The question now is not whether the tower was

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[13] The findings of the trial court refer only to the Cessna involved in the collision. However, it was established at trial (R. 714, 729) that there were in fact three Cessnas making touch and go landings in the right traffic pattern which Miller was given clearance to enter.

negligent in failing to warn because that has been decided. The question is, rather, whether it can be said that Miller was contributorily negligent for failure to see and avoid the Cessna without reference to the tower's duty to warn. Can the tower's duty to warn when it knew of the visual difficulties facing Miller be discarded as having no bearing on Miller's duty of lookout? Can it be said that the duty of the tower has no effect when it was established that both the pilots relied on the tower for the very information which, if given, would have prevented this collision?

Petitioners' contention is not without precedent. Railroad crossing cases provide a direct analogy. A driver approaching a crossing where there is no flagman must look for trains on the track or be barred from recovery by his own contributory negligence. However, if the railroad takes it upon itself to station a flagman at the crossing, the driver's duty of lookout is modified to the extent that he is allowed to rely upon instructions given by the flagman. *Aores v. Great Northern Ry. Co.*, 166 Wash. 17, 6 P.2d 398, (1931)

The Ninth Circuit, in support of its position that the responsibilities are separate, refers to a report of the Civil Aeronautics Board May, 1950, page 19, THE ADVANCE IN AIR SAFETY, which indicates that in the future towers will be capable of positive control and will have the sole responsibility for avoiding accidents. Presuming that such positive control may someday exist, it is a simple matter to recognize three distinct control situations with varying responsibilities: (1) uncontrolled airports (no tower) with the sole

responsibility upon the pilot; (2) the present type of tower (this case) with the pilot and the tower sharing the responsibility; and (3) the airport of the future with positive control and the sole responsibility resting with the tower.

The opinion below depicts a situation with the tower and the pilot acting independently of each other. This view is not consistent with the realities of air traffic control requiring, in a word, teamwork. In the last analysis, the question is whether *Eastern Airlines* v. *Union Trust Co.*, 221 F.2d 62 (C.A. Dist. Col. 1955) affirmed sub nom. *United States* v. *Union Trust Co.*, 350 U.S. 907, which held that the United States would be liable under the Federal Tort Claims Act for the negligence of a control tower operator in failing to warn pilots on a collision course, is to be superceded by the decision below. Petitioners submit that the Ninth Circuit has sidestepped the holding in *Eastern Airlines* when it held that the primary duty to avoid collisions rests with the pilot without considering the Government's negligent failure to warn. It is difficult to conceive of any real function left to the tower if the responsibility to avoid collisions is to be left solely to the pilot. However, this is the only conclusion that can be drawn from the opinion below.

The case now before the Court was tried subsequent to the holding in *Eastern Airlines* which is the landmark case covering the liabiltiy of the United States for negligence in control tower operation. Both parties, both at the trial and appellate levels, relied upon the *Eastern Airlines* decision as stating the controlling law. The

Ninth Circuit, while referring to the holding in *Eastern Airlines*, has stripped it of all force and effect by placing the sole duty upon the pilot. A serious conflict, therefore, exists between the Circuits as a result of the decision below. The seriousness of the conflict is particularly pertinent in this relatively new field where each decision represents a major precedent and the activity of the Federal Government continues to increase.

CONCLUSION

Petitioners, based upon the reasons stated above, request that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

CHARLES ALLAN HART, JR.,
R. R. BULLIVANT,
WALTER H. PENDERGRASS,
PATRICK FORD,
Attorneys for Petitioners.

AFFIDAVIT OF SERVICE

STATE OF OREGON,)
) ss.
County of Multnomah)

I, PATRICK FORD, one of the attorneys for Florene I. Miller and Catherine M. Smith, Executrices of the Estate of Mark Peter Miller, Deceased, and Terminal Flour Mills Company, Petitioners herein, but not a member of the Bar of the Supreme Court of the United States, being first duly sworn, depose and say:

That on the 5th day of November, 1962, I served copies of the foregoing Petition for Writ of Certiorari on the United States of America, respondent, as follows:

1. Upon the Solicitor General, by mailing a copy in an envelope addressed to that person, Department of Justice, Washington 25, D. C., with airmail postage prepaid, which envelope was deposited in a United States Post Office at Portland, Oregon; and

2. Upon Morton Hollander, one of the attorneys of record who represented the United States of America in the Court of Appeals for the Ninth Circuit whose judgment is sought to be reviewed, by mailing a copy in an envelope addressed to that person, Department of Justice, Washington 25, D. C., with airmail postage prepaid, which envelope was deposited in a United States Post Office at Portland, Oregon.

s PATRICK FORD

Subscribed and sworn to before me, at Portland, Oregon this 5th day of November, 1962.

s CHAS. E. WRIGHT
Notary Public for Oregon
My Commission expires: May 24, 1964

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*,
vs.
FLORENE I. MILLER, and CATHERINE M. SMITH, Executrices of the Estate of MARK PETER MILLER, Deceased, *Appellees*.
No. 17,008

UNITED STATES OF AMERICA, *Appellant*,
vs.
TERMINAL FLOUR MILLS COMPANY, *Appellee*.
No. 17,009

May 14, 1962

Appeal from the United States District Court for the District of Oregon.

Before: *BARNES, HAMLEY and MERRILL*, Circuit Judges.

HAMLEY, Circuit Judge:

These two suits brought against the United States under the Federal Tort Claims Act, 28 U.S.C.A., sections 1346(b), 2671 et seq., arose as a result of the mid-air collision of two privately-owned light aircraft near Boeing Field, Seattle. The plaintiffs in one suit are executrices of the estate of Mark Peter Miller, pilot of one of the aircraft, who was killed in the accident. The plaintiff in the other suit is Terminal Flour Mills Company which owned the aircraft operated by Miller.

In both cases the plaintiffs' claims were based on allegations of negligence on the part of Government employees in the control tower at Boeing Field. The United States denied negligence and alleged contributory

negligence on the part of Miller. The cases were consolidated for a non-jury trial which resulted in judgments in favor of the plaintiffs, the total award being $123,085.60. The United States appeals.

On June 21, 1956, when this accident occurred, the Civil Aeronautics Administration (CAA) was an agency of the United States authorized to maintain facilities and employ personnel for the regulation and protection of air traffic.[1] Among such facilities were airport control towers manned by CAA personnel. CAA operated such a tower at Boeing Feld.

At the time of the collision the weather was clear, the visibility and ceiling were unlimited, and the wind was calm. These conditions called for aircraft pilots using Boeing Field to proceed under Visual Flight Rules (VFR) as set forth at 14 CFR 60.30-33, and in the Army, Navy and Civilian (ANC) Procedures for the Control of Air Traffic.[2]

Some few minutes before the accident Miller, who

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[1] The CAA was created by enactment of the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C., sections 401 et seq. The 1938 act has been superseded by the Federal Aviation Act of 1958, 72 Stat. 731; 49 U.S.C., sections 1301 et seq.; which abolished the CAA and transferred its functions to the Federal Aviation Agency (FAA). In this opinion the duties of agencies and pilots will be discussed with reference to the 1938 act, which was in force at the time of the collision.

[2] VFR weather conditions in control zones are those where the ceiling is one thousand feet and visibility is three miles. Flight Information Manual, Vol. 10, June 15, 1956, promulgated and issued by the CAA. Under VFR, pilots can operate their aircraft under "see and be seen" conditions, i.e., when visibility is such that a pilot can observe other aircraft. The ANC procedures are set forth in the ANC Manual jointly published by the Army, Navy, Air Force and CAA.

was piloting his Beechcraft en route from Portland, Oregon to Boeing Field, radioed the tower from an unknown point south of the field, requesting landing instructions. The tower responded "Beech 06 Charlie cleared to enter right traffic, runway 30, wind calm, report turning base."[3] Upon receipt of these instructions Miller inquired as to whether 30 was the short runway, and he was advised by the tower: "30 is the short runway." No further transmission was made to, or received from, Miller.

At the time of and prior to the accident, the personnel of the tower knew that the pilot of the Cessna, which was the other plane involved in the accident, had with him a student who was practicing "touch-and-go" landings on the field and was following a right traffic pattern.[4] The Cessna was being given landing and take-off instructions by means of light signals from a light gun operated from the tower. The tower personnel assumed that the Cessna was being operated by the student pilot. At least one other aircraft from the Boeing-based Forrest Taylor School of Flying was also using runway 30 for that purpose at that time.

After the above-described radio communication between Miller and the tower, the Cessna and other air-

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[3] Neither party makes any point of the fact that Miller was advised to enter "right traffic" instead of "right traffic pattern." It is apparently assumed by all concerned that Miller would understand the advice given as meaning "right traffic pattern." The court so construed the communication from the tower.

[4] In a "touch-and-go" landing the pilot brings the airplane down in a normal approach as if he intended to land, and, upon touching its wheels, the pilot applies power to the airplane and takes off again.

craft based at Boeing Field continued their touch-and-go landings, being directed in this by light gun signals from the tower. Shortly thereafter the Cessna completed a "touch-down" and was climbing to pattern altitude (one thousand feet) on the cross wind leg. The tower personnel did not recall looking at the Cessna after it turned into the crosswind leg.[5]
leg."

As the Cessna was climbing along the crosswind leg at a speed of about seventy to ninety miles per hour, the Beechcraft, piloted by Miller, came over the hills to the northeast of the field. The latter plane, which was traveling 140 to 160 miles per hour, was then at an altitude of one thousand to eleven hundred feet, which was slightly higher than the Cessna. It was descending in a turning left bank of about ten to fifteen degrees.

While the Beechcraft was engaged in this maneuver about sixteen hundred to two thousand feet north of the point of impact, the Cessna executed a ninety-degree right turn off of the crosswind leg onto the downwind leg. It had almost completely leveled out on that leg at the time of the collision.

Miller's Beechcraft was visible from the control tower for from eighteen to twenty-four seconds immediately prior to the collision. Had the tower operator seen

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[5] The four sides, or legs, of any rectangular pattern are separately designated. That which includes the runway is known as the "approach" or "take-off" leg, depending upon whether the aircraft involved is landing or taking off. The opposite leg, which runs parallel to the runway is known as the "downwind leg." The leg which joins the "take-off-leg" and the "downwind leg" is the "crosswind leg." The opposite leg, or that joining the "approach leg" to the "downwind leg" is the "base

Miller's plane during that time he would have recognized that it might constitute a hazard to the operation of the Cessna, and that the Cessna might constitute a hazard to the operation of the Beechcraft. Neither operator saw the Beechcraft at any time prior to the collision, nor did they see the collision itself. Hence no effort was made by the tower to inform Miller by radio of the proximity of the Cessna.

On the basis of these facts the trial court found and concluded that the tower operators were negligent in eight different respects, as set out in the margin.[6] The trial court also found and concluded that the negligence of the tower operators was the proximate cause of the collision between the two airplanes. Finally, the court found and concluded, Miller was not contributorily negligent.

Appellant challenges each of these ultimate findings and conclusions as to negligence, proximate cause, and contributory negligence. We turn first to the question of contributory negligence. If the finding and conclusion

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[6] (a) In failing to advise the Beechcraft of the presence of and possibility of collision with the Cessna; (b) In failing to advise the Cessna of the presence of and possibility of collision with the Beechcraft; (c) In failing to maintain a continuous watch over all aircraft within the Control Zone; (d) In allowing the Cessna to continue its touch-and-go landing procedure under circumstances such as might bring it into collision with the Beechcraft; (e) In failing to maintain proper or any control over the Beechcraft and the Cessna so that each would be properly spaced in the traffic pattern; (f) In instructing the Beechcraft that it was cleared to enter the traffic pattern without advising it of the presence of other aircraft in the pattern; (g) In failing to observe and warn the Beechcraft of the presence of the Cessna; (h) In failing to observe and instruct the Beechcraft to alter its course so as to avoid a collision with the Cessna.

that Miller was not contributorily negligent cannot stand, the judgment must be reversed, without regard to whether the court was correct as to negligence and proximate cause.

The Government argues that, under the established facts, Miller was contributorily negligent in several respects. One of these, it was asserted, was his violation of the right-of-way rules prescribed by the CAA with regard to converging and overtaking aircraft. The pertinent part of the Air Traffic Rules in question, 14 CFR, part 60, section 60.14 (b) and (d), is quoted in the margin.[7]

The basic facts as to the relative position of the aircraft immediately prior to the collision are not in dispute. The Cessna approached the point of impact from the right of Miller's Beechcraft and turned to a course approximately parallel to that of the Beechcraft. The Beechcraft overtook the Cessna, the right wing of the Beechcraft striking the left wing of the Cessna from the rear.

It follows that, both as the aircraft on the right, and as the overtaken aircraft, the Cessna had the right-of-

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[7] § 60.14(b): "*Converging*. . . . When two or more aircraft of the same category are converging at approximately the same altitude, each aircraft shall give way to the other which is on its right. . . ."

§ 60.14(d): "*Overtaking*. An aircraft that is being overtaken has the right-of-way, and the overtaking aircraft, whether climbing, descending, or in horizontal flight, shall keep out of the way of the other aircraft by altering its course to the right, and no subsequent changes in the relative positions of the two aircraft shall absolve the overtaking aircraft from this obligation until it is entirely past and clear."

way over the Beechcraft, providing that under the circumstances then existing, the right-of-way rules referred to above were applicable.

But appellees argue that, under conditions then existing, these right-of-way rules were not applicable. This argument is predicated upon a "note" which appears under section 60.14, reading in part as follows:

> "Note: Right-of-way rules do not apply when, for reasons beyond the pilot's control, aircraft cannot be seen due to restrictions of visibility. . . ."

Appellees contend that this note governs, and renders the right-of-way rules inapplicable, because the trial court found as a fact that ". . . Miller could have maintained a reasonable lookout while approaching the point of impact and not have seen the Cessna because of his limited visibility and the camouflage effect of the background." On the other hand, the Government contends that if it be assumed that this finding of fact is correct, it still would not have excused Miller from performing the duty imposed by the regulations to accord the right of way to the Cessna.[8]

It is axiomatic that any regulation should be construed to effectuate the intent of the enacting body. Such intent may be ascertained by considering the language used and the overall purpose of the regulation, and by reflecting on the practical effect of the possible interpretations.

The phrases "beyond the pilot's control" and "can-

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[8] Alternatively, the Government contends that the finding itself is clearly erroneous. We do not reach the latter contention.

not be seen" appear to contemplate that only physical impossibility, due to such factors as weather or terrain, should excuse application of the right-of-way rules. Had mere difficulty of recognition or perception been intended as the relevant criterion, more appropriate language would have been used.

This conclusion is supported by reference to the specific language of the right-of-way rules. Several pilots testified that it is much more difficult to see an aircraft which is at a lower altitude, where it may be partially camouflaged, than to see an aircraft against the horizon or sky. Presumably this fact was known to the CAA when these rules were promulgated, yet no consideration was given to this factor in prescribing the right-of-way rules.[9]

It is unlikely that the CAA would provide in a rule that the aircraft at a higher altitude must give way to one at a lower altitude, then in a note to the rule excuse the pilot of the former of this duty because it is difficult to observe the latter.

Practical considerations of air safety also tend to support this interpretation of the rules. It is in and around cities, with their concomitant background camouflage,

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[9] Paragraph (d) of the right-of-way rules states:

". . . An aircraft that is being overtaken has the right-of-way, and the overtaking aircraft, whether climbing, *descending*, or in horizonal flight, shall keep out of the way of the other aircraft . . .".

Paragraph (c) of the same rule states:

". . . When two or more aircraft are approaching an airport for the purpose of landing, the aircraft at the *lower* altitude has the right-of-way . . ." (Emphasis added.)

that most airports, and hence most air traffic, will be found. It is most improbable that under these circumstances, where the utmost of vigilance is demanded, the CAA would choose to relieve a pilot of the duty to obey the right-of-way rules because of conditions which are characteristically normal for such an area.

With this construction in mind, we turn to the question of whether the above-quoted finding of fact is sufficient to excuse the duty to comply with the right-of-way rules. This finding refers to two circumstances, either of which assertedly might have prevented Miller, in the exercise of reasonable care, from seeing the Cessna. One of these circumstances was the "camouflage effect of the background" which was found to exist in the area around Boeing Field.

Under certain ideal conditions an object which is camouflaged may be invisible for practical purposes. When such conditions exist one can accurately say that it "cannot be seen." Under the undisputed facts, however, such conditions did not prevail at the time of this collision. The flight path of Miller's plane was at approximately a ninety-degree angle to the path of the Cessna until immediately prior to the impact. The motion of the white-winged Cessna across a stationary background composed of multicolored objects would have made it visible.

The trial court did not find that, by reason of the camouflage effect, the Cessna was physically invisible. It found only that a "reasonable lookout" might not have revealed the Cessna. This was actually more of a

conclusion of law than a finding of fact. The "lookout" which Miller actually maintained obviously did not reveal the Cessna to him. But whether that was a "reasonable" lookout depends upon the legal duty of care imposed upon Miller as a pilot, under the circumstances then existing. We think the court erroneously discounted the degree of care incumbent upon Miller with regard to the lookout to be maintained by him in approaching Boeing Field at that time and place.

It may be that in order to have seen the Cessna against this background Miller would have had to look thoroughly and diligently in the area in which the Cessna was flying. But if this is the degree of care required of the ordinarily prudent pilot, then such is the standard to which Miller must be held. We believe that this is the standard imposed by the rules, and it is not for the courts to say that the standard is too exacting.

Miller knew, or should have known, that the greatest likelihood of conflicting traffic would come from the precise area in which the Cessna was flying. He should have anticipated the possibility of aircraft on the cross-wind leg of the traffic pattern, and should have made a thorough surveillance of that area his prime concern.[10]

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[10] There was substantial disagreement among the pilots who testified as to whether the phrase "cleared to enter right traffic" should have indicated to Miller that there was traffic in the pattern. The trial court apparently found that it did not indicate that traffic existed, since it found the tower negligent in failing to inform Miller of the other traffic. In our view the language of the regulations requires the pilot to operate on the assumption that there is other traffic, and the testimony of pilots as to their understanding should not be permitted to alter the meaning expressed in the regulations.

In the other part of the finding in question it is stated that Miller's visibility was limited. Inasmuch as the weather was clear and the visibility at the field was unlimited, this finding must relate to the fact that Miller was seated in the left seat and was, just prior to the impact, banking slightly (ten to fifteen degrees) to the left, thus placing the fuselage and right wing in such position as to obscure his vision in the area in which the Cessna was flying. Under appellee's own version of the facts this was the attitude of the Beechcraft. It therefore appears that the probable reason Miller did

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14 CFR Part 617, § 617.25(b)(2)(i) provides:

"A normal clearance to enter the traffic pattern shall be issued to a pilot whenever the controller desires that the aircraft approach the landing area in accordance with current traffic patterns. If a normal clearance to enter traffic pattern is not appropriate for the *existing traffic* conditions . . . an alternate clearance . . . may be used. . . ."

Paragraph (b)(2)(iii) of the same rule provides:

"The clearance to enter traffic pattern . . . is issued when the aircraft is some distance from the field and *traffic conditions* will not permit the issuance of a landing clearance." (Emphasis added.)

A contemporaneous construction of these regulations in Volume 9 of the Flight Information Manual, issued on June 15, 1955, states at page 19:

". . . Clearance to enter traffic pattern *informs the pilot that traffic exists in the traffic pattern*, but does not constitute landing authority . . . (C)learance to land is ordinarily withheld until the aircraft is in sight of the control tower and no conflicting traffic will interfere with the landing." (Emphasis added.)

The Flight Information Manual is a publication of the United States Department of Commerce, Office of Aviation Information. It is primarily designed to provide useful information to pilots, but does not have the force of law. This language was omitted from the 1957 publication of the Flight Manual (subsequent to the aircraft collision in question) apparently for the reason that, by then, aircraft noise as well as aircraft traffic was a reason for requiring adherence to established traffic patterns.

not see the Cessna was not because of the camouflage effect, but because his aircraft was in such an attitude that he could not even observe the area in which the Cessna was flying.[11]

Assuming that this properly may be called a limitation on visibility, it is nevertheless not sufficient to invoke the exception to the right-of-way rules. This is not a condition beyond the pilot's control; all that was required to remove this limitation was a momentary bank or roll in the opposite direction. As indicated above, Miller should reasonably have anticipated conflicting traffic on his right and below him; he cannot relieve himself of the duty to observe this traffic by voluntarily placing an obstruction in his line of sight.[12]

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[11] In failing properly to clear the area to his right prior to banking to the left, Miller may have violated another provision of the Air Traffic Rules. 14 CFR, Part 60, § 60.12 reads:

"*Careless or reckless operation:* No person shall operate an aircraft in a careless or reckless manner so as to endanger the life or property of others.

"Note: Examples . . .

"(c) Lack of vigilance by the pilot to observe and avoid other air traffic. In this respect, the pilot must clear his position prior to starting any maneuver, either on the ground or in flight."

[12] L. S. White, one of appellee's witnesses who had wide experience as a pilot testified as follows: Q. If you are . . . coming from that direction [northeast, or the route followed by Miller] at pattern altitude, and there is a plane coming on the cross-wind leg, you would then feel that you would be in a better position to observe him? A. I think I would be at that particular field. That doesn't apply to all fields because they have different terrain . . . (Y)ou have got your airplane where you can look down . . . Before making a turn you always roll your plane from one side to another to increase your vision to see what is in the area . . ."

See *New York Airways, Inc.* v. *United States*, 2 Cir., 283 F.2d

We conclude that neither because of the camouflage effect of the background, nor the position of Miller in the left seat of a left-banking plane, was Miller excused from according the Cessna the right of way under the note to section 60.14 (the right-of-way rule) quoted above.

In finding that Miller was not contributorily negligent the trial court may have felt that where a control tower is present to direct traffic, the controllers have the primary responsibility for controlling aircraft so as to prevent collisions, and that pilots are under such circumstances relieved from the duty otherwise placed upon them to accord the right of way as prescribed by rule.

Such a view would be erroneous, because of focal point of ultimate responsibility for the safe operation of aircraft under VFR weather conditions rests with the pilot.[13] Under such conditions he is obligated to observe

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496, also a suit against the Government based on alleged negligence of the tower operators. The court there stated (at page 498):

> ". . . [the trial court] made . . . findings of fact including a finding that 'the pilot did not engage in maneuvers that would have increased visibility through the blind spots.' This and other findings . . . support his conclusion that plaintiff failed to sustain its burden of proving freedom from contributory negligence."

The trial court in this case did not make a finding on this point; however the uncontradicted evidence shows that Miller did not maneuver so as to increase his visibility through the blind spot to his right.

[13] 14 CFR, Part 60, § 60.2 provides, in part:

> "The pilot in command of the aircraft shall be directly responsible for its operation and shall have final authority as to operation of the aircraft. . . ."

and avoid other traffic, even if he is flying with a traffic clearance.[14]

The CAA has recognized that with increasing density of traffic, increasing speed, and increasingly complex aircraft which require more attention inside the cockpit, safe operation is facilitated by providing assistance from ground personnel.[15] Such assistance is provided by the towers. The duties of tower operators are delineated in great detail in the manuals provided for the use of those personnel. Some of these duties overlap with the duties which other regulations placed on pilots.[16] It may be

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[14] A footnote to section 60.21-1 provides, in part:

"... It is the direct responsibility of the pilot to avoid other aircraft when flying in VFR conditions *even with a traffic clearance* ..." (Emphasis added.)

[15] It is anticipated that at some future time many of the duties presently imposed on pilots may be assumed by ground personnel. In THE ADVANCE IN AIR SAFETY, Report of the Civil Aeronautics Board, May 1958, page 19, it is stated:

"The air traffic control system of the future, unlike our present system, is designed to provide for the separation of all aircraft at all times regardless of weather. This is known as *positive control*.

"There is no element of aviation which has advocated or is ready to advocate positive control *today* of all airspace. To do so with the 'men, money, and machines' now available would instantly ground 85 percent of traffic." (Emphasis in original.)

[16] The ANC manual of air traffic control procedures (Revised 2nd Ed., effective July 15, 1955), which is the "bible" for tower operators, provides in part:

"3.400 General—An airport traffic controller shall issue such traffic clearances and other information as are necessary for the prevention of collisions between aircraft under his jurisdiction.

"3.500 ... (D)ue to the restricted space on and around landing areas, it is often essential that traffic information be issued to aid the pilots to avoid collision between aircraft.

"3.510 Detailed essential local traffic information shall

this overlap which has led some to believe that if these duties are imposed on the tower operators, the rules governing the duties of pilots under similar circumstances are only applicable where there is no tower.

The rules governing the duties of pilots, however, make it clear that none of those duties are rendered inapplicable merely because a clearance from a tower has been received.[18] It is stated and reiterated that the function of tower personnel is merely to assist the pilot in the performance of the duties imposed, not relieve him of those duties.

The optimum of safety is sought to be achieved by imposing concurrent duties on the pilots and tower personnel. In any given case, one, both, or neither could

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be issued when, in the judgment of the controller, such information is necessary in the interests of safety, or when requested by a pilot."

[17] See *United States* v. *Schultetus*, 5 Cir., 277 F.2d 322, where the court stated at pages 326-327:

"It seems apparent that the district court had an erroneous concept of the functions and duties of the operators of the control tower . . . The theory followed by the district court would place upon the operators of control towers the primary responsibility for the operation of aircraft at the field. Governmental regulations, having the force of law, have assigned this responsibility to the operators of aircraft." (Footnote omitted.)

[18] In addition to Schultetus, at least two other courts have recognized that a clearance from the tower does not relieve the pilot of any of the duties imposed by the regulations. See *New York Airways, Inc.*, v. *United States*, 2 Cir., 283 F.2d 496; *Khourey* v. *American Airlines, Inc.*, 170 Ohio St. 310, 164 NE2d 402.

A footnote under 14 CFR, Part 60, § 20.21-1, states:

"An air traffic clearance . . . is issued for the purpose of preventing collision between aircraft known to Air Traffic Control and does not constitute authority to violate any provision of the CAR. . . ."

be guilty of a breach of the duties imposed. This view is implicit in the decision of the court in *Eastern Airlines v. Union Trust Co.*, D.C.Cir., 221 F.2d 62, affirmed, sub nom., *United States v. Union Trust Co.*, 350 U.S. 907. The ultimate result reached in that case recognized that both the Government and the airline had concurrently breached their duties, and each was held liable.

We conclude that Miller was not excused by reason of the control tower operation from his duty, under the VFR weather conditions prevailing at the time of the collision, to give way to the Cessna which was in the favored position, or from doing whatever was necessary to clear the area in which the Cessna was flying.

Miller's violation of the right-of-way rules was negligence which proximately contributed to this accident and therefore precluded any recovery for his wrongful death under the controlling law.[19]

In view of this conclusion, it is unnecessary for us to decide whether Miller was contributorily negligent in any of the other respects asserted by the Government.[20]

---

[19] See, e.g., *Bissell v. Seattle Vancouver Motor Freight*, 25 Wn.2d 68, 168 P.2d 390. Cf. *Hall v. Osell*, 102 Cal.App.2d 849, 228 P.2d 293; *Ratton v. Busby*, 230 Ark. 667, 326 S.W.2d 889. The statutes of Washington (RCW 14.16.050), provide:

"... it shall be unlawful for any person to navigate any aircraft within this state otherwise than in conformity with said [Federal] air traffic rules."

[20] The other respects in which it is asserted Miller was contributorily negligent, are as follows: (1) failing to enter the traffic pattern at the prescribed point or altitude; (2) entering the traffic pattern at excessive speed, and (3) entering the traffic pattern in an improper manner, i.e., in a ten to fifteen degree left bank.

It is likewise unnecessary to decide whether the trial court erred in finding and concluding that the tower operators were negligent in one or more of the eight respects listed in footnote 6, and in finding and concluding that such negligence was a proximate cause of the collision.

The judgment is reversed.

(Endorsed) Opinion Filed May 14, 1962.

Frank H. Schmid, Clerk.

APPENDIX B

District Court Memorandum Opinion Delivered from the Bench (omitting title of court and cause).

Gentlemen, I have rather definite ideas on when a Judge can do the best job of deciding a case. As a Judge I have had little experience. As a trial lawyer I have had a great deal. I believe that there is no time that a decision on the facts can be made better than at the close of the testimony. Certainly that is true in this case, where I have had the benefit of very worth-while briefs on both sides. After all, your contentions are pointed up in the pre-trial order. The issues are framed, and the briefs follow those issues. In view of that fact, I feel, since I am now convinced as to how this case should be decided, that I should render my decision at this time. [748]

We have some serious questions of law, and of course I will mention those as we pass along. I will say this: That from the cases which have been cited and from my own research we are dealing here with a dangerous activity. I am not going to say in my remarks from the bench that an airplane as such is a dangerous instrumentality. I don't think I have to say one way or the other. We do know, and it is common knowledge, that planes are dangerous.

That fact, of course, was equally known to the operators of the planes and to the Government. Even though the activity is dangerous, the standard of care in itself

does not vary; it does not change, but the degree of care does. I don't have the citations, but I know it is a general rule, and Sullivan vs. Mountain States Electric Company, I think, is probably one of the outstanding cases in Oregon. That deals with electricity as dangerous product, and states that very rule. That when we are dealing with a dangerous situation we must use care which is commensurate with that danger.

First of all, on the question of the negligence of the defendant, I feel this way. That although the gentlemen in the tower may have felt that they didn't have any obligation to notify the decedent, I find they had a duty. This being what appears to be a dangerous airport and it being a dangerous occupation in which the Government has placed itself in the operation of that tower, it owed a high degree of care, not [749] only to the decedent on landing in this case, but it owed that degree of care to him as he was piloting his plane toward this airport.

I feel that with the radio transmissions which are in evidence, the persons in the tower probably had knowledge of the fact that this was an itinerant flier. Certainly they had knowledge of the fact that he intended to land. Certainly the tower operators knew that he was coming to this airport. And once they knew that, it was in the nature of a red flag. That is particularly true when you have a pattern in which people are flying around the airport. The evidence in this case shows that on a day such as this 90 per cent of these accidents happen.

The employes of the Government admitted on their examination that they were familiar with the danger which existed on a day such as this, even though the visual flight regulations might have been in effect. They knew that this man was going into this pattern. Whether there was knowledge of his distance away from the field, I think you can look at that one way or the other. If they didn't have the knowledge, then by the testimony of at least one of their own witnesses and by my construction of the rules under any exercise of due care if the man coming in had overlook that, and if it was essential to their information—which I am not passing on—certainly they could have obtained that information. They knew he was [750] someplace. They could assume that he was, say, within fifteen miles. Shortly after that time they knew that this other plane, the Cessna, came down, touched the ground and that it was going up again. It was given a green light to go up, and they knew that it was going into this pattern.

The operators of the tower knew and it had been common practice that itinerant fliers didn't enter this pattern at the center, but entered in other places, as a matter of fact, many places, as the deposition of Mr. Welchko showed, and that they were actually "concerned about it," using his own language, about the fact that they were entering at different places. So we have to take that knowledge directly to the Government, that they knew this plane might be entering at any place along that pattern. Nevertheless, there was no warning to the Cessna and there was no warning to the other plane.

On the question of negligence I hold that there is liability on the part of the Government and that the plaintiff has established against the defendant its Specifications Nos. 1 and 8, inclusive. I am disregarding No. 9.

With reference to the question of contributory negligence,—the question of law here is serious.—If the resolution or regulation of the King County Court is to be given the effect of law and if there is sufficient in that regulation to require that a person should enter this pattern, say, at the center of the downwind leg, then I would feel, as a matter of [751] law, that the plaintiff was guilty of contributory negligence which would preclude his recovery. That would be, the fact, irrespective of custom or where they had been going into this leg. The mandate of the resolution would prevail and the decedent would have been negligent as a matter of law.

I hold that this regulation does not have the effect of law on the question of the pattern or where the pattern should be entered.

Now, going to the factual side of contributory negligence, I feel from all of the evidence in this case that this man was on a flight and that he was evidently going into a pattern which certainly, under some very creditable evidence, even though you would say it was not customary, nevertheless was not unusual. And in going into the pattern at the northeast end of the traffic pattern, if that was a customary place to enter for itinerant traffic and other traffic, of course that would not be negligence.

It might be said that he knew—there is a question about that—that there was some traffic in the pattern. But I seriously question if you can say that he might know that some plane might be coming from underneath, a plane that would have landed and which would be within a point of convergence where he would be coming in, and that that plane would have been cleared from the field without his receiving a warning from the field with reference to that particular action. [752]

It is true, if you look at it from one position, that the Cessna was approaching from the right. It is a question as to where the turn was and where the rule might come into effect. There is some testimony on some angle measurements which were taken that if you would take the line of view of the eye of this pilot, he would not be looking at the area which had the homes, the aluminum roofs or the galvanized roofs that might cause a great deal of confusion to a pilot. The fact is that there were certain conditions there which might obscure the pilot's vision. I am not prepared to say, and I am not going to say, that this man was negligent as a fact under these circumstances, where he was coming in, and where the other plane was coming up from underneath. After all, you can't expect the pilot any more than I would expect the person actually in the tower to keep looking in one direction. If he scanned this area and a reasonably prudent person would not have seen the other plane, under the circumstances, then of course he would be released of any charge of negligence, even though this plane was coming in from his right. He is supposed to see what he should have seen, what a reasonably prudent person would have seen.

Of course, the mandate of the regulation cannot be enforced if a reasonably prudent person would not have known or could not have seen the plane coming from the right.

So I hold that the Government has failed to establish [753] the defense of contributory negligence on any of its counts and that the plaintiffs here are entitled to recover.

On our future proceedings I assume that the practice would be, although I am not holding that at the present time, there would be another date set for the taking of the testimony on the question of damages in each of the cases.

My remarks here will be transcribed and go into each of the cases. I don't feel that it would be appropriate at this time, although again I may be in error, to make findings on this particular issue of liability. In any event, that can be checked.

I want to thank Counsel for both sides for your very excellent presentation of this rather difficult case. This law is in the process of the making. Airplane law is new. This may be one of the cases that will eventually make some law that will put us on a firmer foundation. [754]

[Endorsed]: Filed July 14, 1960.

APPENDIX C

District Court Findings of Fact and Conclusions of Law (omitting title of court and cause)

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cases were consolidated for trial on the segregated issue of liability and trial was held thereon before the undersigned, Judge of the above-entitled Court, on the issues framed by consolidated pretrial order previously entered October , 1959. Trial on the segregated liability issue in both cases commenced October 20, 1959. At said trial, plaintiffs in both cases appeared by R. R. Bulliyant and Darrel L. Johnson, their attorneys, and the defendant appeared by C. E. Luckey, United States attorney, Russell Pettibone, attorney, Department of Justice, and by William Crawford, Chief, Litigation Section, Federal Aviation Agency.

Following the conclusion of the trial on the segregated issue of liability in both cases, the Court determined that the defendant was liable and had been guilty of negligence proximately causing the damages of plaintiffs in each case in the particulars hereafter set forth in these findings and that the decedent, Mark Peter Miller, was not guilty of contributory negligence.

Thereafter, the above-entitled causes, by order of the Court, were further consolidated for trial on the issue of damages sustained by the plaintiffs in each case and

said trial on said issue commenced before the undersigned, Judge of the above-entitled Court, on January 19, 1960. At said trial on the issue of damages, plaintiffs appeared by R. R. Bullivant and Walter H. Pendergrass, of their attorneys, and the defendant appeared by C. E. Luckey, United States Attorney.

The Court, now being fully advised and having heard and considered all of the evidence and testimony herein, makes and enters the following

Findings of Fact

1. Florene I. Miller and Catherine M. Smith are the duly appointed, qualified and acting Executrices of the Will of Mark Peter Miller, deceased, duly appointed by the District Court of the State of Oregon for the County of Washington.

2. Terminal Flour Mills Company, now is and at all times herein material, has been a corporation organized and existing under the laws of the State of Oregon.

3. This court has jurisdiction of these causes pursuant to the provisions of Title 28 of the United States, Section 1346 (b), subject to any applicable exclusionary provisions of Section 2680 thereof, none of which exclusionary provisions are here applicable.

4. At all times material hereto the Civil Aeronautics Administration was an agency of the defendant and operated an Air Traffic Control Tower at King County Airport, sometimes referred to as Boeing Field, King County, Washington. At all times materials hereto, defendant's employees on duty in the Air Traffic Control Tower were acting within the scope of their employment.

5. On June 21, 1956, at approximately 9:35 A. M., a Beechcraft airplane piloted by Mark Peter Miller came into collision with a Cessna airplane occupied by Calvin Boyle, instructor, and Ellis Clark, student. All three persons died as the proximate result of said collision.

6. The collision hereinabove referred to occurred at an altitude of approximately 1,000 feet above sea level, within the Air Traffic Control Zone at Boeing Field, and within the air traffic pattern then in use at Boeing Field. Said collision was not observed by any of the employees of defendant then on duty in the Air Traffic Control Tower. The point of impact was approximately over the intersection of Brandon Street and Twenty-sixth Avenue South and the bend in the power lines. A point at 1,000 feet altitude above sea level, approximately over the intersection of Brandon Street and Twenty-sixth Avenue South and over the bend in the powerline, is a point which can be seen from the Air Traffic Control Tower at Boeing Field.

7. At the time of said collision, the weather was clear, the visibility and ceiling were unlimited and the wind was calm, which constitute Visual Flight Rules conditions as defined by the Code of Federal Regulations, Title 14, and the ANC Procedures for the Control of Air Traffic.

8. At some time prior to the collision in question Mark Peter Miller reported by radio he was south of Boeing Field and requested landing instructions from the Air Traffic Control Tower and was advised via radio by personnel on duty in said tower as follows:

"Beech 06C cleared to enter right traffic runway 30 wind calm report turning base."

Upon receipt of this advice, said Mark Peter Miller inquired as to whether that was the short runway.

Personnel on duty in the tower advised him as follows:

"30 is the short runway."

There was no further radio communication or attempted communication between the Air Traffic Control Tower and Mark Peter Miller until after the tower personnel received information concerning a collision, at which time the personnel then attempted to call Mark Peter Miller by radio, without reply.

9. At the time of and prior to said collision the Cessna aircraft was based at Boeing Field. At said time there was a King County airport requirement that all aircraft based at said field, including the Cessna in question, have and maintain radio receiving equipment and monitor radio transmissions from the Air Traffic Control Tower at all times said aircraft were in operation within the Control Zone at Boeing Field. At the time of the collision in question, some aircraft based at Boeing Field were not equipped as required and some aircraft, even though properly equipped, did not monitor the radio transmissions of the Air Traffic Control Tower. The defendant did not have a direct right or power to enforce the said King County Airport rules and regulations at Boeing Field. Defendant did not know whether the said Cessna was monitoring the tower radio transmissions

10. At the time of and prior to the accident, the personnel in the Air Traffic Control Tower knew that the pilot of the Cessna had been practicing touch-and-go landings and was following a right traffic pattern. At said time the Cessna had been given landing and take-off instructions by means of light signals from a light gun, and this was the only means of communication between the Air Traffic Control Tower and the Cessna which was being used. After the radio communication with Mark Peter Miller referred to in Paragraph 8 preceding, the personnel in the Air Traffic Control Tower gave a green light to the Cessna as it was descending for a landing, thereby authorizing said plane to land or to land and take off and the Cessna landed and took off. At no time thereafter did the defendant communicate or attempt to communicate with the Cessna aircraft by radio or otherwise. The personnel in the Air Traffic Control Tower did not see the collision nor did they see the Beechcraft at any time prior to the collision.

11. Defendant's employees, James C. Sprouse, Charles L. Welchko and Edgar B. Walkington, acting within the scope of their employment, knew different pilots entered the traffic pattern at Boeing Field at various places on the downwind leg.

12. The Code of Federal Regulations, Title 14, and the issue of ANC, Procedure for the Control of Air Traffic, dated September 15, 1955, contain some of the rules, regulations, practices and procedures for the operation of Air Traffic Control Towers in effect at the time of the collision, including the tower at Boeing Field.

13. At the time of the accident, the downwind leg of the flight pattern at Boeing Field was a directional flow of traffic at approximately 1,000 feet altitude above sea level and approximately parallel with the applicable runway. Defendant's employees, Charles L. Welchko, James C. Sprouse and Edgar B. Walkington, acting within the scope of their employment, knew that some planes did not adhere consistently to the limits, if any, of the air traffic pattern (as might be indicated by a mimeographed sketch) published by the Boeing Field Airport management.

14. There is no issue in these cases concerning the physical condition or health of Mark Peter Miller at any time prior to his death nor as to the mechanical condition of the Beechcraft.

15. At the time of his death, Mark Peter Miller was thirty-two years of age, married to Florene I. Miller, born September 26, 1928, and the father of three minor children: a son, Mark P. Miller, born June 1, 1950, a daughter, Suzanne C. Miller, born August 29, 1952, and a son, Miles J. Miller, born November 22, 1955. His wife, Florene I. Miller and his said children all survived him, and are still living. The decedent, Mark Peter Miller, and his wife were married December 28, 1948, and he, his wife, and their children were living together as a family at all times up until the time of his death and his wife and his said children have continued to live together at all times since. His wife has not remarried.

16. At all times subsequent to his marriage and up until the time of his death, the wife of the decedent,

Mark Peter Miller, and all of his children were supported by the said Park Peter Miller and were dependent upon him for their support. Civil No. 9678, being the action entitled Florence I. Miller and Catharine M. Smith, Executrices of the Estate of Mark Peter Miller, deceased, vs. United States of America, was brought pursuant to Sections 4.20.005-4.20.020, Revised Code of Washington, for the benefit of the surviving widow and children of the decedent, Mark Peter Miller.

17. At the time of the collision of the aircraft here involved, Mark Peter Miller, the decedent, was an officer of Terminal Flour Mills Company, plaintiff in the above-entitled cause, Civil No. 9677; the Beechcraft plane he was operating belonged to said plaintiff, and he was then on the business of said plaintiff.

18. Under the circumstances and conditions existing at the time of and immediately preceding the collision between the Beechcraft and the Cessna, as are hereinafter set forth, all of which circumstances and conditions were known to or reasonably should have been known to the defendant, the defendant had a duty to be alert to the presence of all aircraft within the Control Zone, to advise pilots of essential local traffic, and to properly direct and control all traffic within the Control Zone, particularly the Beechcraft and the Cessna, so as to prevent collisions. The circumstances and conditions to which reference is made are as follows:

A. The visibility of Mark Peter Miller was limited because:

1. He was sitting in the left-hand side of the cock-

pit of the Beechcraft, a low-wing airplane, and the area to be viewed was at his right; and

2. The background of the line of sight between the Beechcraft and the Cessna was composed of a multi-patterned and a multi-colored heterogeneous grouping of buildings, streets, trees, ground and other objects, forming a camouflage against which it was extremely difficult, if not impossible at times, for the Cessna to be seen.

B. Mark Peter Miller was probably not based at Boeing Field.

C. Mark Peter Miller was not completely familiar with Boeing Field.

D. The Cessna was occupied by a student pilot and an instructor, and tower personnel assumed it was being operated by the student pilot.

E. Some aircraft at Boeing Field did not have the radio equipment required by the King County regulations, and some of those who had the equipment did not use it all the time they were required so to do.

F. The defendant, through its employees, knew or assumed that the Cessna was continuing his touch-and-go landing pattern.

G. The employees of the defendant did not look at or see the Cessna after it turned into the crosswind leg.

H. The defendant gave the Cessna a green light authorizing it to continue touch-and-go landings after it had cleared the Beechcraft for entry into the traffic pattern.

I. After the Cessna had landed and taken off pursuant to the green light, it was practically impossible for the defendant to communicate with or direct or control it before it reached the point of impact.

J. Prior to the collision the Cessna was ascending and the Beechcraft was descending toward the point of impact.

K. There was confusion among pilots concerning the meaning of the phrase "cleared to enter traffic pattern."

L. Various tower operators differed in giving "essention local traffic" information.

M. The phrase "cleared to enter traffic pattern" is not a standard form of communication used routinely from airport to airport.

N. Various pilots entered the downwind leg of the right traffic pattern at Boeing Field at different points.

O. The defendant had not maintained a continuous lookout for all aircraft within the control zone prior to the collision nor was it maintaining such a lookout at the time of the collision.

P. Mark Peter Miller could have maintained a reasonable lookout while approaching the point of impact and not have seen the Cessna because of his limited visibility and the camouflage effect of the background.

Q. The pilots of the Beechcraft and the Cessna relied upon the defendant to provide them with "essential local traffic information."

R. The Cessna was "essential local traffic" to the Beechcraft.

19. The defendant is chargeable with the facts and information known to its employees relevant to their duties when they are acting within the scope of their employment.

20. The defendant was negligent and careless in the operation of the Air Traffic Control Tower at Boeing Field in the Following respects:

a. In failing to advise the Beechcraft of the presence of and possibility of collision with the Cessna.

b. In failing to advise the Cessna of the presence of and possbility of collision with the Beechcraft.

c. In failing to maintain a continuous watch over all aircraft within the Control Zone.

d. In allowing the Cessna to continue its touch-and-go landing procedure under circumstances such as might bring it into collision with the Beechcraft.

e. In failing to maintain proper or any control over the Beechcraft and the Cessna so that each would be properly spaced in the traffic pattern.

f. In instructing the Beechcraft that it was cleared to enter the traffic pattern without advising it of the presence of other aircraft in the pattern.

g. In failing to observe and warn the Beechcraft of the presence of the Cessna.

h. In failing to observe and instruct the Beechcraft to alter its course so as to avoid a collision with the Cessna.

21. The negligence of defendant, as previously speci-

fied, was the proximate cause of the damages of the plaintiffs in each of these consolidated causes in the amounts hereafter set forth.

22. The decedent, Mark Peter Miller, was not negligent in any of the particulars charged either in the pretrial order herein or in the answer to either complaint herein and the damages sustained by the plaintiffs in these consolidated actions were not caused in whole or in part and were not contributed to by the negligence or fault of the said Mark Peter Miller. This finding, without limiting the foregoing, includes but is not limited to the findings that Ordinance No. 13492, of King County, Washington, was not violated by the said decedent as to point or place of entry into the downwind leg of the traffic pattern and that it had no effect in determining whether the decedent was guilty of contributory negligence and that it did not have the effect of law on the location of the traffic pattern or the place or point of entry therein.

23. As a direct and proximate result of the negligence of the defendant, the damages sustained by the plaintiffs and survivors of Mark Peter Miller, his widow and his three children aforesaid for whose benefit Civil No. 9678 is brought, are the sum of $114,085.60, consisting of funeral expenses incurred by the estate of the decedent in the amount of $1,585.60 and further damages in the sum of $112,500.00, all of which damages are found to have been so incurred and sustained under and pursuant to the law of the State of Washington.

24. As a direct and proximate result of the negli-

gence of the defendant, plaintiff, Terminal Flour Mills Company, in the above-entitled action Civil No. 9677, has been damaged in the sum of $9,000.00, which said sum is found and determined to be the reasonable market value of said plane at the time of the accident here involved, less the salvage value thereof.

25. The sum of $1,800.00 is a reasonable sum to be allowed to R. R. Bullivant, Darrel L. Johnson and Walter H. Pendergrass, attorneys for the plaintiff, Terminal Flour Mills Company in Civil No. 9677, and the further sum of $22,817.00 is a reasonable sum to be awarded to the said attorneys for their services for the plaintiffs, Florene I. Miller and Catharine M. Smith, as Executrices in Civil No. 9678. This award is made pursuant to the provisions of Title 28, United States Code, Section 2678, and the amounts involved are to be paid out of but not in addition to the amount for which judgment shall be entered in each case and each of said amounts is not in excess of 20 per centum of the amount recovered.

Based upon the foregoing findings of fact, the Court makes and enters the following

Conclusions of Law

1. The plaintiff, Terminal Flour Mills Company, in Civil No. 9677, is entitled to recover judgment against defendant for its damages sustained as a direct and proximate result of the negligence of the defendant in the particulars heretofore set forth in the total sum of $9,000.00, and its costs and disbursements.

2. Plaintiffs, Florene I. Miller and Catharine M. Smith, Executrices of the Estate of Mark Peter Miller, deceased, plaintiffs in Civil No. 9678, are entitled to recover judgment against defendant, for the benefit of the survivors and dependents of decedent, his widow, Florene I. Miller, and his children, Mark P. Miller, Suzanne C. Miller and Miles J. Miller in the total sum of $114,085.60 as their damages directly and proximately caused by the negligence of the defendant as heretofore set forth, together with their costs and disbursements.

3. R. R. Bullivant, Darrel L. Johnson and Walter H. Pendergrass, attorneys for the plaintiff, Terminal Flour Mills Company, in Civil No. 9677, are allowed $1800.00, to be paid out of but not in addition to the amount for which judgment shall be entered, as reasonable attorneys fees, which said sum does not exceed 20 per centum of the amount recovered for said plaintiff.

4. R. R. Bullivant, Darrel L. Johnson and Walter H. Pendergrass, attorneys for the plaintiffs, Florene I. Miller and Catharine M. Smith, as Executrices of the Estate of Mark Peter Miller, deceased, are entitled to be allowed the sum of $22,817.00 as reasonable attorneys fees in said Civil No. 9678 to be paid out of but not in addition to the amount of the judgment recovered and said sum does not exceed 20 per centum of the amount recovered.

5. Ordinance No. 13492 of King County, Washington did not have the effect of law, at the time of the accident here involved, on the question of flight pattern or where the flight pattern should be entered.

These Findings of Fact and Conclusions of Law shall be and they hereby are entered in each of the above-entitled consolidated causes and judgment shall be entered in accordance therewith in each of said causes.

Dated and Entered this 26 day of February, 1960.

s/ JOHN F. KILKENNY,
Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 579

FLORENE I. MILLER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings, conclusions and memorandum opinion of the district court (Pet. 46–65) are not reported. The opinion of the court of appeals (Pet. 29–45) is reported at 303 F. 2d 703. The order of that court denying the petition for rehearing is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1962. A timely petition for rehearing was denied on June 15, 1962. Time for filing a petition for a writ of certiorari was extended by order of Mr. Chief Justice Warren to November 12, 1962. The

petition for a writ of certiorari was filed on November 7, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in reversing the district court's determination that decedent was not contributorily negligent in the operation of the aircraft he was piloting at the time of the mid-air collision giving rise to this action.

2. Whether the government is liable to an airplane pilot, notwithstanding his own contributory negligence, for the negligence of airport traffic control tower personnel in failing to warn the pilot of other aircraft in the vicinity.

STATUTE AND RULES INVOLVED

The pertinent provisions of the Federal Tort Claims Act and applicable Air Traffic Rules are set forth in the Appendix, pp. 9–11, *infra*.

STATEMENT

This is an action under the Federal Tort Claims Act (*infra*, pp. 9–10) to recover damages for personal injuries and property damage arising out of the mid-air collision of two privately-owned aircraft over Boeing Field, near Seattle, Washington. Petitioners are the executrices of the estate of Mark Peter Miller, pilot of one of the planes, who seek to recover damages for his wrongful death, and the Terminal Flour Mills Company, owner of the plane, which seeks damages for its destruction. They assert that the accident was caused by negligence on the part of govern-

ment employees manning the control tower at Boeing Field.

On June 21, 1956, at approximately 9:35 a.m., in clear weather with visibility and ceiling unlimited (Pet. 54), a Beechcraft airplane piloted by Miller collided with a Cessna airplane. Miller, who was coming from Portland, Oregon, approached the field from the south and, pursuant to instructions from the control tower, piloted the Beechcraft along a clockwise (right traffic) pattern around the field. At the time of collision, his plane was northeast of the field at an altitude of just over 1000 feet, and was descending in a southerly direction in a turning left bank of 10–15 degrees. The Cessna, having taken off on a northerly course, turned right (east) as it climbed and leveled off at 1000 feet, then banked right again (south), putting it on a course generally parallel to the west (on the right) of the path of Miller's Beechcraft. The latter, descending in a left bank, overtook and collided with the Cessna. The right wing of the Beechcraft struck the Cessna's left wing from the rear.

The district court found the control tower operators negligent in several respects[1] and rendered judgment for the petitioners. In so holding, it rejected the government's contention that Miller was contributorily negligent in failing to see—and thereupon to grant the right of way to—the Cessna (Pet. 51, 62). The court based this ruling on its finding that "Miller

[1] The eight respects in which the district court found the government negligent are enumerated by the court of appeals in footnote 6 of its opinion (Pet. 33).

could have maintained a reasonable lookout * * * and not have seen the Cessna * * *" because his visibility was limited by reason of the facts that (a) he was in the left hand seat of the left-banking Beechcraft and could not see the Cessna on his right and (b) the Cessna was obscured by the camouflage effect of the background (Pet. 58–59, 60, 62).

On appeal the Ninth Circuit reversed; holding that "Miller's violation of the right-of-way rules was negligence which proximately contributed to this accident" (Pet. 44). It held that Miller's failure to grant the Cessna the right-of-way was not excused by either of the two circumstances relied upon by the district court. With respect to the first—the fact that, due to the left turn bank, the right wing and fuselage of his own plane blocked Miller's vision of the Cessna—the court held that Miller was required momentarily to roll or bank in order to have a view of any traffic on his right (Pet. 40). As to the camouflage effect of the background, the court concluded that the "thorough and diligent search" required by the applicable Air Traffic Rules should have revealed to Miller the movement of the white-winged Cessna across the stationary, multi-colored background (Pet. 37–38).

ARGUMENT

This case involves no issue of law peculiar to the Tort Claims Act but turns on the application of settled principles of the law of negligence to particular facts. There is no occasion, we believe, for review by this Court.

Petitioners do not question the finding below that Miller was contributorily negligent in failing to ma-

ment of the Beechcraft to obtain a view of any traffic on his right (Pet. 39–40).

They contend, however (Pet. 9–13), that the court of appeals improperly rejected the district court's conclusion that "Miller could have established a reasonable lookout while approaching the point of impact and not have seen the Cessna because of . . . the camouflage effect of the background" (Pet. 66). This contention rests on petitioners' assertion that the district court's conclusion was a finding of fact that Miller did not see the Cessna—which was not shown to be "clearly erroneous" and should, therefore, have been affirmed by the court of appeals in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

A review of the opinion of the court of appeals reveals that in conformity with Rule 52(a) it accepted as correct the district court's findings: "The 'lookout' which Miller actually maintained obviously did not reveal the Cessna to him" (Pet. 38). It reversed the district court solely on a question of law—whether the lookout which Miller maintained was a reasonable one. After noting that the undisputed record evidence showed that the white-winged Cessna was moving against a stationary, multi-colored background, the court of appeals stated (Pet. 37–38):

> The trial court did not find that, by reason of the camouflage effect, the Cessna was physi-

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[5] The Air Traffic Rules require such a clearing maneuver. See 14 C.F.R. 60.12, *initial*, p. 19; *New York Airways* v. *United States*, 283 F. 2d 496, 498 (C.A. 2). At trial, petitioners' own expert witness testified that a prudent pilot "always" clears his path of vision in this manner before turning. See footnote 12 of the court of appeals opinion (Pet. 40–41).

> cally invisible. It found only that a "reasonable lookout" might not have revealed the Cessna. This was actually more of a conclusion of law than a finding of fact. The "lookout" which Miller actually maintained obviously did not reveal the Cessna to him. But whether that was a "reasonable" lookout depends upon the legal duty of care imposed upon Miller as a pilot, under the circumstances then existing. We think the court erroneously discounted the degree of care incumbent upon Miller with regard to the lookout to be maintained by him in approaching Boeing Field at that time and place.
>
> It may be that in order to have seen the Cessna against this background Miller would have had to look thoroughly and diligently in the area in which the Cessna was flying. But if this is the degree of care required of the ordinarily prudent pilot, then such is the standard to which Miller must be held. We believe that this is the standard imposed by the rules, and it is not for the courts to say that the standard is too exacting.

Thus, there is no violation of Rule 52(a) but solely a rejection by the court of appeals of the legal duty of care accepted by the district court.[8]

2. Petitioners also assert (Pet. 14–20) that the court of appeals should not have applied the Air

[8] Of no more merit is petitioners' suggestion (Pet. 11–13) that the issue of contributory negligence presented only a factual question. It is obvious that the question of the correctness of the standard of care applied by the district court presents an issue of law, and one wholly appropriate for review on appeal.

Traffic Rules prescribing the relative rights-of-way of converging and overtaking aircraft, 14 C.F.R. 60.14 (Appendix, *infra*, pp. 10–11), because the duty of care which they impose exceeds the corresponding common-law duty of care imposed upon operators of land vehicles. The fact that the CAA (now FAA) Air Traffic Rules impose on pilots an exacting duty of care is hardly one which suggests the need for—or, indeed, is even appropriate for—judicial review. As stated by the court of appeals, "this is the standard imposed by the rules, and it is not for the courts to say that the standard is too exacting" (Pet. 38).[1]

3. Alternatively, petitioners contend (Pet. 20–26) that, notwithstanding the contributory negligence of the pilot, the control tower operators must be held responsible because they have a "primary" duty to maintain safe conditions in the vicinity of an airport. The short answer to this interpretation of the relative responsibilities of control tower operators and pilots is that it is directly contrary to all existing authority;

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[1] There is similarly no merit in petitioners' assertion (Pet. 19, n. 11) that the court below misconceived the manner in which the CAA intended the right-of-way rules to be applied. The assertion rests on an introductory "Note" to Section 60.14 of the Air Traffic Rules, 14 C.F.R. 60.14 (Appendix, *infra*, p. 10), which provides that the "Right-of-way rules do not apply when, for reasons beyond the pilot's control, aircraft cannot be seen due to restrictions of visibility * * *." Petitioners' claim is that since Miller did not see the Cessna, it "[could not] be seen" within the meaning of this "Note." The court of appeals, after reference to the language and over-all purpose of the Air Traffic Rules, properly rejected this argument holding that the phrase "cannot be seen" contemplates "only physical impossibility, due to such factors as weather or terrain" and not "mere difficulty of recognition or perception * * *" (Pet. 35–37).

The regulations expressly provide that, when flying in Visual Flight Rule (VFR) weather conditions, as is concededly the case here, the pilot has the primary responsibility for avoiding other aircraft. See 14 C.F.R. 60.21–1, 617.21(b)(1), and 617.26(a)(1) (Appendix, *infra*, p. 11). The courts which have considered this question have uniformly reached this conclusion. See *United States* v. *Schaltenbrand*, 277 F. 2d 322, 326–27 (C.A. 5), certiorari denied, 364 U.S. 828; *Stratmore* v. *United States*, 206 F. Supp. 665, 672–73 (D. N.J.).[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] Contrary to petitioners' suggestion (Pet. 25–26), there is nothing in the instant case inconsistent with *Eastern Air Lines, Inc.* v. *Union Trust Co.*, 221 F. 2d 73–80 (C.A. D.C.), affirmed *per curiam*, *sub nom. United States* v. *Union Trust Co.*, 350 U.S. 907. That case merely holds that the Federal Tort Claims Act intended to subject the government to suit for negligent control tower operations. There is nothing in *Eastern Air Lines* which even implicitly contradicts the recognized rule that a pilot flying in VFR weather conditions has the primary responsibility for avoiding collision.

APPENDIX

The relevant provisions of the Federal Tort Claims Act are as follows:

28 U.S.C. 1346(b):

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for

whose benefit the action was brought, in lieu thereof.

The relevant provisions of the CAA (now FAA) Air Traffic Rules are as follows:

14 C.F.R. 60.12:

> No person shall operate an aircraft in a careless or reckless manner so as to endanger the life or property of others.
>
> NOTE: Examples of aircraft operations which may endanger the lives or property of others are:
>
> * * * * *
>
> (e) Lack of vigilance by the pilot to observe and avoid other air traffic. This includes failure of the pilot to clear his position prior to starting any maneuver, either on the ground or in flight; * * *.

14 C.F.R. 60.14:

> An aircraft which is obliged by the following rules to keep out of the way of another shall avoid passing over or under the other, or crossing ahead of it, unless passing well clear:
>
> NOTE: Right-of-way rules do not apply when, for reasons beyond the pilot's control, aircraft cannot be seen due to restrictions of visibility. * * *
>
> * * * * *
>
> (b) *Converging.* * * * When two or more aircraft of the same category are converging at approximately the same altitude, each aircraft shall give way to the other which is on its right.* * *
>
> * * * * *
>
> (d) *Overtaking.* An aircraft that is being overtaken has the right-of-way, and the overtaking aircraft, whether climbing, descending, or in horizontal flight, shall keep out of the way of the other aircraft by altering its course to the right, and no subsequent change in the relative positions of the two aircraft shall absolve

the overtaking aircraft from this obligation until it is entirely past and clear:

NOTE: Passing an overtaken aircraft on the right is required because the pilot in side-by-side, dual-control aircraft is seated on the left and has a better view on that side. Further, in narrow traffic lanes, passing on the left of an overtaken aircraft would place the overtaking aircraft in the path of the oncoming traffic.

(e) *Landing.* * * * When two or more aircraft are approaching an airport for the purpose of landing, the aircraft at the lower altitude has the right-of-way, but it shall not take advantage of this rule to cut in in front of another which is on final approach to land, or to overtake that aircraft. * * *

14 C.F.R. 60.21–1:

* * * It is the direct responsibility of the pilot to avoid other aircraft when flying in VFR conditions even with a traffic clearance. * * *

14 C.F.R. 617.21(b)(1) (1952 Rev.), 16 F.R. 3461:

(b) *Responsibility of pilots.*

(1) When flying in visual flight rule weather conditions it is considered the direct responsibility of the pilot to avoid collision with other aircraft. Under such conditions, the information and clearances issued by the control tower are intended to aid pilots to the fullest extent in avoiding collisions.

14 C.F.R. 617.26(a)(1) (1952 Rev.), 16 F.R. 3470:

When operating under visual flight rules it is the responsibility of the pilot to avoid collision with other aircraft. * * *